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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1912

DANNY LEE FULTZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

DANNY LEE FULTZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Danny Lee Fultz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 5, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is annexed hereto as Appendix I. The memorandum opinion of the District Court, not yet reported, is annexed hereto as Appendix II.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 5, 1980. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether knowledge that a carbine was fired from the vicinity of union picketers provided a reasonable basis for a warrantless search of the vehicles of all persons present at the demonstration site.

2. Whether the reasonableness of the general search for weapons should be scrutinized more carefully in view of the fact the officer performing the search under color of state law was also an employee of the company trying to break the strike.

3. Whether the reasonableness of the general search for weapons should be scrutinized more carefully in view of the fact that those persons whose vehicles were searched were engaged in activities protected by the first amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV.

> **Unreasonable searches and seizures.**—The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

U.S. Const. amend. I.

Religious and political freedom.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Danny Lee Fultz was indicted and convicted in a nonjury trial for a violation of 26 U.S.C. §§ 5861(d) and 5871, possessing an unregistered sawed-off shotgun. Fultz, sentenced to one year in prison, was released on bond pending appeal. Prior to trial, a suppression hearing was held, after which the District Court concluded that the warrantless search of Fultz's pickup truck was reasonable. This conclusion was predicated upon the finding that the deputy sheriffs, one of whom was a part-time employee of the company against whom the strike was directed, had probable cause to search Fultz's pickup truck and that exigent circumstances enabled them to do so without a warrant. The Sixth Circuit affirmed over the dissent of Judge Merritt. The facts giving rise to Fultz's appeal and this petition are as follows.

On June 28, 1979, Danny Fultz was present at a union picket line at the Donlin plant in New Tazewell Tennessee, where his wife was stationed as a picketing employee. Fultz, who was not a union member, had driven to the site and parked and locked his pickup truck, which was equipped with an enclosed camper top. The

camper top, which opened from the rear of the truck, was locked.

At approximately midnight, shots were apparently fired into the side of the Donlin plant. While persons on the picket line had been shooting firecrackers, Worsham, a security guard, observed what he believed to be muzzle flashes from a carbine rifle.[1]

Mr. Watson, a deputy who was also present at the plant, heard two reports, which he thought were firecrackers, followed by six or eight more reports where bullets struck the building. Worsham immediately called local police officers, who arrived at the scene without use of their emergency equipment.

The officers were told that the shots had initially been presumed to be exploding firecrackers; that the shots were fired from a carbine rifle; and that the muzzle flashes had been observed in a wooded area behind the picketers. The officers then proceeded to the site of the picketing. Four patrol cars converged on the scene and were positioned such that the area was illuminated by their headlamps and egress was blocked. At this point, one of the officers stated that he had no idea whether there were any weapons in Fultz's pickup truck.

An officer asked the 15 persons congregated at the scene if they had fired any weapons or heard shots fired. According to an officer's testimony, someone said that shots had been fired, but that they didn't know where. However, other witnesses testified that the officers had been told that shots had been fired from a wooded area some distance away.

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[1] Whether the record established gun fire or carbine fire was hotly disputed by the Sixth Circuit. While the petitioner's position is set forth in the text, probable cause to search does not exist regardless of which construction of the record this Court adopts.

Dissatisfied with the response, it was announced that the officers intended to search every vehicle, "if it took all night." A deputy sheriff conducted a *Terry* pat-down of one man, who had his hands in his pockets. Only firecrackers were found. While one of the officers testified that he was concerned for his personal safety, the above was the only *Terry* search. The officers then instructed everyone to walk to, and stand beside his or her vehicle. Thirty minutes after receiving the shooting report, the police began to search all of the vehicles. Under the frame of a bus a recently discharged M-1 carbine rifle was discovered.

Fultz's pickup was searched by an officer, who was also a part-time employee of the company seeking to break the strike. After being ordered to unlock the camper, and after being told that, "if you don't open it, I will," Fultz unlocked the camper door. Since Fultz did not open the door, and since he stood mute after unlocking the door, the trial court ruled that it was not a consent search. Forty-five minutes after the shots had been fired, Fultz's shotgun was discovered hidden under a mattress and blanket in the back of his camper. It had not been fired recently.

There was no testimony that Fultz was believed to be armed, that he acted suspiciously, that it was probable that weapons were secreted in his pickup, or that he was connected with the shooting incident. Fultz's car was searched because he was present at the picketing site.

The search was held to be reasonable, Fultz was convicted, and the court imposed a one-year sentence upon a first offender, a life-time resident of Claiborne County and a father with three young children.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS IN PRINCIPLE, IF NOT DIRECTLY, WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS WITH REGARD TO THE QUANTUM OF PROOF NECESSARY TO ESTABLISH THE REASONABLENESS OF A MASS, WARRANTLESS SEARCH

This Court has announced on countless occasions that under the fourth amendment warrantless searches are *per se* unconstitutional unless the government can justify its actions under one of several carefully defined exceptions. *E.g., Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971). These judicially-created exceptions have developed from the reasonableness requirement and have evolved from a balancing of the public interest on the one hand, and the rights of the individual protected by the fourth amendment on the other. *United States v. Martinez-Fuerte,* 428 U.S. 543, 555 (1976). Three factors have been crucial in determining the reasonableness of a particular warrantless search: the strength of the public necessity to search, and the degree and nature of the intrusion upon the individual. *See, e.g., United States v. Skipwith,* 482 F.2d 1272, 1275 (5th Cir. 1973).

In the present case, a fourth factor exists that supports granting a writ: defendant and the other persons whose vehicles were searched were engaged in a union demonstrstration, activity that is protected by the first amendment.[2] *Cf. Zurcher v. The Stanford Daily,* 436 U.S. 547, 558 (1978) (reasonableness requirement must be applied with "particular exactitude when first

[2]The first amendment issues are discussed more fully in section II, *infra.*

amendment materials involved); *UMW v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967) (union right to assemble and petition for redress of grievances). While each fourth amendment case must turn on the particular facts presented, this court has been able to identify broad categories into which most factual situations can be divided, and from this, to define a minimally acceptable quantum of proof necessary to satisfy constitutional standards. Yet, in the many years that this Court has decided fourth amendment cases, it has not been faced with the necessity to analyze the respective fourth amendment interests of the police and individuals in union demonstrations in cases in which violence may, or has occurred.

It is imperative that this Court address the above issue. First, the issue of violence during union demonstrations involves a not uncommon situation nationwide. Second, the issue is particularly important in the Southern states, where union organizing and demonstrations are occurring with increasing frequency. Third, given the clear first amendment issues involved, a failure to define and adequately assess fourth amendment issues in the context of union demonstrations would involve a radical departure from previous cases in which first and fourth amendment considerations merited serious judicial consideration. Such a failure could result in chilling the first amendment rights of union demonstrators. Fourth, in view of the fact that violence may be reported to police by the company opposing union demonstrators, the potential for harassment of labor is great, and a clear definition of the information required to support mass arrests or searches would substantially further both societal and individual interests in future situations. The following subsections set forth the conflicts in principle between

the Sixth Circuit's decision and decisions of this Court and other circuit courts.

(a) *Individualized suspicion.* In most fourth amendment cases, the reasonableness standard is implemented by requiring "at a minimum, that the facts upon which an intrusion is based be capable of measurement against an objective standard, whether this be probable cause[3] or a less stringent standard."[4] *Deleware v. Prouse,* 440 U.S. 648, 654 (1979). This objective standard is directed to the elimination of intrusions resulting from the exercise of the unbridled discretion of police officers or public officials.

> Armed with their roving commission, they set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect.[5]

In the recent case of *Ybarra v. Illinois,* ___ U.S. ___, 62 L. Ed. 2d 238 (1979), Justice Stewart invalidated a mass search of bar patrons, unsupported by probable cause or even articulable suspicions, stating that each

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[3]*E.g., Beck v. Ohio,* 379 U.S. 89 (1964) (probable cause is such information as would justify a reasonably prudent person in believing that the person arrested was guilty of a crime). For the difference between probable cause to arrest and probable cause to search, see *Zurcher v. The Stanford Daily, supra,* 436 U.S. at 556, n.6.

[4]*E.g., Brown v. Texas,* ___ U.S. ___, 99 S. Ct. 2637 (1979) (seizure based on less than probable cause must be supported by specific objective facts); *Deleware v. Prowse,* 440 U.S. 648, 661 (1979).

[5]*Stanford v. Texas,* 379 U.S. 476, 483 (1965), *quoting, Wilkes v. Wood,* 19 How. St. Tr. 1153 (1763). *See also Camera v. Municipal Court,* 387 U.S. 523, 535 (1967) (public interest does not justify sweeping search for contraband).

person present "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure." *Id.* at 246. Further, Justice Stewart emphasized that one's mere propinquity to others independently suspected of crime does not give rise, without more, to either probable cause or reasonable suspicion. *Id.* at 245; *Sibron v. New York*, 392 U.S. 40, 62-63 (1967); *United States v. DiRe*, 332 U.S. 581, 583-87 (1947). The rule in *Ybarra* applies even though violence may be suspected. *Cf. Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 120 (D.C. Cir. 1977) (one may not be arrested for violence committed by others); *Barnett v. D'Artois*, 331 F. Supp. 1310, 1318 n.16 *and accompanying text* (W.D. La. 1971) (mass arrests based on knowledge that demonstrators armed and in possession of Molotov cocktails are improper). Nor is the claim of exigent circumstances sufficient to circumvent *Ybarra* without a showing of objective facts supporting the intrusion. *See Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963) (exigency not substitute for probable cause); *United States v. Scott*, 520 F.2d 697, 700 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976).

In view of the above, with the exception of airport and courthouse searches, mass searches without an objectively verifiable factual predicate have been uniformly condemned. *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977) (war demonstration); *Gaioni v. Folmar*, 460 F. Supp. 10, 13 n.9 (M.D. Ala. 1978) (rock concert); *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977) (rock concert); *Collier v. Miller*, 414 F. Supp. 1357, 1361 (S.D. Tex. 1976) (mass searches unreasonable); *Piazzola v. Watkins*, 316 F. Supp. 624, 625-28 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284, 287

(5th Cir. 1971) (fishing expeditions unlawful). *But see Chenkin v. Bellevue Hosp. Center,* 479 F. Supp. 207 (S.D.N.Y. 1979).

In the present case, even assuming that the rifle shots were shown to have been fired by the union demonstrators, there is absolutely no evidence supporting a conclusion that Fultz was justifiably searched. This issue is important, and must be reviewed.

(b) *"Automobile" not talisman.* The privacy expectation of union demonstrators in the sanctity of their parked and locked automobiles is similar to that relating to one's house. *Cf. Deleware v. Prouse, supra,* 440 U.S. at 662-63 (great sense of security and privacy in automobile). This is especially true in the present case, in which the cars were being used as a base of operations, not a mode of conveyance. Further, this expectation was not defeated by the actions of the police in ordering the demonstrators to walk to, and stand by their vehicles. *Cf. Coolidge v. New Hampshire, supra,* 403 U.S. at 456-57 (even pre-*Chimel* arrest outside house would not justify search in house).

Contrary to the conclusion of the trial court, *Carroll v. United States,* 267 U.S. 132 (1924) is inapposite. This follows since no exigency was shown; no reasonable suspicion was described supporting an arrest or detention of any of the union demonstrators, *e.g., United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) (even border stops require some objectively verifiable facts); and no reasonable suspicion was described supporting the conclusion that contraband was in a particular automobile. *E.g., United States v. Frisbie,* 550 F.2d 335, 337-40 (5th Cir.), *reh. denied,* 554 F.2d 1065 (1977); *United States v. Miller,* 452 F.2d 731 (10th Cir. 1971), *cert. denied,* 407 U.S. 926 (1973) (by implication).

The privacy expectations of the demonstrators in their automobiles, the propriety of ordering them to stand by their automobiles, and the quantum of proof necessary to search those automobiles are all issues that should be addressed *in the context of the rights of those participating in union picketing.*

II.

TWO UNIQUE QUESTIONS RELATIVE TO THE JUDICIAL STANDARD TO BE EMPLOYED IN EVALUATING THE REASONABLENESS OF THE WARRANTLESS SEARCH IN THE PRESENT CASE, HAVE NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

This Court has recognized that in cases in which first amendment rights are involved, government regulation of conduct is closely scrutinized. *E.g., Brandenburg v. Ohio,* 395 U.S. 444, 447-49 (1969) (per curiam); *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966). And, when first and fourth amendment issues are presented, the requirements of the fourth amendment are applied with "particular exactitude." *See, e.g., Zurcher v. The Stanford Daily, supra,* 436 U.S. at 525; *Stanford v. Texas, supra,* 379 U.S. 476. While this Court has recognized that union activities are presumptively protected by the first amendment,[6] including picketing activities,[7] it has not ruled upon the interrelationship between the first and fourth amendment rights of those participating in a union demonstration when violent incidents arise.

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[6]*See, e.g., Smith v. Arkansas State Hwy. Employees,* 441 U.S. 463 (1979); *UMW v. Gibbs, supra,* 389 U.S. at 222.

[7]*See Thornhill v. Alabama,* 310 U.S. 88, 98-100 (1939) (peaceful demonstrations on public property). *Cf. Youngdahl v. Rainfair,* 355 U.S. 131 (1959) (interpretation of N.L.R.A., 29 U.S.C. § 151: state courts without jurisdiction to enjoin peaceful demonstrations).

The issues are obviously important, given the chilling effect on first amendment rights that general searches of all present during a potentially violent union incident would have on lawful demonstrators who are merely present. *Cf. Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976) (threat of civil or criminal sanctions can chill exercise of first amendment rights). While this Court has held that first amendment rights are not absolute and are subject to reasonable regulation, *e.g., Cox v. Louisiana,* 379 U.S. 536, 554-55 (1965); *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Schenck v. United States,* 249 U.S. 47 (1918) (Holmes, J.: not free to shout fire in theatre), and that the potential for violence may lower the quantum of probable cause required to seize a person, *e.g., Terry v. Ohio,* 392 U.S. 1 (1967), it has generally insisted on strict application of the fourth amendment requirements to warrantless searches regardless of the potential for violence. In view of the foregoing, the following issues, unique to the labor demonstration involved in the present case, have not been, but should be resolved.

(a) *Dual allegiance of searching officer.* The warrant requiement of the fourth amendment is enforced strictly because, given the severity of intrusion into the private lives of individuals seized, it is presumed that inferences from facts arguably establishing probable cause would be drawn more impartially by a neutral party

> instead of being judged by the officer engaged in the *often competitive enterprise* of ferreting out crime.[8] [Emphasis added.]

Given this concern for impartiality, it cannot be doubted that, in a labor situation, the fact that an officer who arrests or searches demonstrators under color of

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[8] *Coolidge v. New Hampshire, supra,* 403 U.S. at 449.

state law and who also works for the company involved in the dispute, has dual allegiances.

> Here the government concedes that the deputy sheriff of Claiborne County, Tennessee, who conducted the search in question was in the pay of the company trying to break the strike. We should therefore scrutinize even more carefully than usual any warrantless nighttime search. . . .[9]

There is no existing direct authority for the proposition that such facts warrant strict scrutiny of the reasonableness of the officer's actions. Yet authority for the proposition exists. *Cf. Connally v. Georgia,* 429 U.S. 2[illegible] (per curiam) (issuance of warrant by justice of peace who received five dollars violates requirement of neutral and detached magistrate); 18 U.S.C. § 207 (The Ethics in Government Act); *Armstrong v. McAlpin,* 606 F.2d 28 (2d Cir. 1979); Note, *Conflicts of Interest and the Former Government Attorney,* 65 GEORGETOWN L. REV. 1025 (1977).

The Sixth Circuit apparently missed the point of this argument. There, the majority concluded that it was urged "to infer that the deputy acted differently in this case than he would have in the absence of a connection with the struck plant. . . ." The Sixth Circuit then concluded that since the district court found that there was probable cause and that the search was not unreasonably extended, the search was proper. Contrary to the Sixth Circuit's perception, it would be impossible to prove what the officer would have done had he not been in the company's employ. Further, an inference that he did act improperly would totally vitiate the search. Rather, it is defendant's position that when a warrantless

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[9]Appendix, at 4a (Merritt, J., dissenting).

search is involved, the question is the *reasonableness* of the government's actions. And, when a labor dispute is involved, and when it is established that the officer acting under color of state law in conducting a search is also an employee of the company, that officer's actions must be absolutely reasonable, in light of the facts surrounding the search and the alternatives available to him.

While prior decisions of this Court cast serious doubt upon the Sixth Circuit's finding of probable cause, the dual allegiance issue, if mandating a higher standard of reasonableness, could invalidate the search even if probable cause existed.

(b) *Effect of Existence of Labor Dispute.* As stated previously, the existence of first amendment issues subjects governmental action to close judicial scrutiny. In view of the fact that Fultz was present at a labor demonstration where a massive warrantless search took place, the reasonableness of the officers' actions in searching all of the automobiles present, including defendant's, must be carefully reviewed. Such a review must include a consideration of the least intrusive alternative available to the officers. *Cf. United States v. O'Brien,* 391 U.S. 367, 377 (1968) (when government regulates activity combining first amendment conduct with other forms of conduct the incidental restriction must be no greater than necessary to further a legitimate governmental interest).

In the present case, aside from the failure to establish reasonable facts or articulable suspicions with regard to the necessity to search any specific demonstrator or any specific automobile, the government failed to explain why an initial *Terry* search would not have sufficed. Further, assuming that future violence was imminent

(which is not established by the record), the government did not attempt to explain why the demonstrators were not advised to dispurse, *see Washington Mobilization Committee v. Cullinane,* 566 F.2d 107, 120 (D.C. Cir. 1977), and advised that if they did not do so, they could be arrested.[10] In view of the significant issues presented by this labor dispute, this Court should grant the writ to identify the standard for review and the weight of the interests to be balanced in determining the propriety of mass searches of labor demonstrators.

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[10]TENN. CODE ANN. § 39-1213 (1975) provides, in relevant part, that: "It shall be unlawful for any person to disturb the peace . . . by conduct calculated to provoke violence or a violation of the law."

CONCLUSION

For the reasons set out above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX I.

No. 79-5360

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DANNY LEE FULTZ, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed May 5, 1980.

Before: LIVELY, MERRITT and KENNEDY, Circuit Judges.

The Court delivered a per curiam opinion. Judge Merritt, Circuit Judge (pp. 4-6) delivered a separate dissenting opinion.

PER CURIAM. Defendant appeals from his conviction for possession of a sawed-off shotgun in violation of 26 U.S.C. §§ 5861(d) and 5871. The only issues before the court arise from the district court's denial of a motion to suppress the shotgun as evidence and to return defendant's truck from which the weapon was seized.

The officers who searched the truck of the defendant had no warrant. They had been called to the scene of a disturbance in rural Claiborne County, Tennessee between midnight and 1:00 a.m. A security guard at a plant where a strike was going on reported that weapons were being fired toward the plant from an area where five or six vehicles were parked

some distance from the plant. When officers from the sheriff's department arrived at the scene, the plant guard told them he had seen muzzle flashes coming from the area "right in the middle of the strikers." Though the guard stated at the hearing, on cross-examination, that at least one of the weapons "sounded like a carbine," he reiterated his previous testimony that he saw "muzzle flashes" and "I knew *they* were shooting from that end."

When they arrived in the area from which the guard said the shots had come, the officers were told by one of the group congregated there that there had been no gunfire. The officers searched all the vehicles in the area. Early in the search, a carbine rifle was found under a school bus parked with the strikers' cars and trucks. The defendant argues that even if there was probable cause to begin a search, it should have been stopped when the carbine was found since no other weapon had been identified. As we have shown, the witness to the shooting told the officers "they" had been firing shots and that he had seen several muzzle flashes. It was reasonable for the officers to continue to search for other weapons after the carbine was found. Discovery of the carbine gave additional reason to seek other weapons since the officers then had reason to believe that the earlier disclaimer was false.

We thus agree with the district court that the officers had probable cause to search the vehicles. (The defendant was not searched or frisked.) We also agree that under the circumstances the search could be lawfully conducted without a warrant. The nearest judicial officer from whom a warrant could be obtained lived approximately 13 miles from the scene of the search. About five police officers were at the scene. If one had been dispatched to get a warrant, it would have been reasonable for the remaining officers to seize and hold the truck of defendant and the other vehicles until the warrant was obtained. The Supreme Court has held that

when there is probable cause for search of a vehicle there is no difference for constitutional purposes between seizing and holding a vehicle until a warrant is obtained and, on the other hand, carrying out an immediate search without a warrant. "Either course is reasonable under the Fourth Amendment." *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970).

At oral argument counsel for the defendant stated that the deputy who conducted the search was also involved financially in the company which furnished security guards to the struck plant. He emphasized that the deputy was acting in his official capacity and that the search of defendant's truck was not a private search. Nevertheless, he urged this court to infer that the deputy acted differently in this case than he would have in the absence of a connection with the struck plant and to hold that he conducted a "general search" that was unreasonable. The district court heard the evidence which related the tie between the deputy and the struck plant. There was probable cause to conduct a search and the district court found no unreasonable extension of the search. This determination was not erroneous.

We find no merit in the remaining contentions of the appellant.

The judgment of the district court is affirmed.

MERRITT, Circuit Judge, dissenting. Here the government concedes that the deputy sheriff of Claiborne County, Tennessee, who conducted the search in question was in the pay of a company trying to break a strike. We should therefore scrutinize even more carefully than usual any warrantless, nighttime search of the strikers' personal effects conducted by the deputy upon information furnished by the company security guard – a man who was on loan from the deputy's private security guard service.

My reading of the record convinces me that the deputy was told by the company guard only that the strikers had fired several volleys from a carbine rifle. There is no evidence that the strikers fired more than one weapon. The security guard for the company testified as follows:

> Q. Now, while you were sitting in your pickup truck, did you observe the strikers there, or where the cars were parked down in this area?
>
> A. Yes, sir. I could see them. And like I said, they had been shooting firecrackers.
>
> As I was sitting in my truck I heard a couple of real loud – it didn't exactly sound like firecrackers. I turned to look, and I seen muzzle flashes.
>
> Q. Where were the muzzle flashes coming from?
>
> A. Right out of the middle of where they were.
>
> Q. When you say "they," the strikers?
> The court: What do you mean by "muzzle flashes?"
>
> A. The fire that comes out of the end of a gun when you shoot it.
>
> . . . .
>
> (App. 10-11)
>
> Q. Have you formed a conclusion in your mind, based upon your knowledge of weapons as to what type of weapon it was that you saw discharge?

A. I really hadn't given much thought about that. I just knew it was a gun.

Q. Haven't you testified before that you believe this was a carbine?

A. It sounded like a carbine.

Q. And you owned an M-1 carbine yourself?

A. Yes, sir, I have.

Q. At that moment you thought a carbine would be responsible for the fire?

A. Yes.

Q. Is that what you told Mr. Jesse and Mr. Ramsey [the police officers]?

A. I said it sounded like a carbine, but may not have been one. I wasn't sure.

. . . .

(App. 15-16)

Once the deputy found the carbine under the bus, he had no reason to search the strikers and their automobiles further. There was no probable cause to search for anything else. The subsequent search was simply a general exploratory search. This is the same kind of general exploratory search for weapons which led to the adoption of the Fourth Amendment. The British soldiers in Boston at least had a general warrant, or a "writ of assistance." According to the defendant, the deputy had nothing to justify the exploratory search except the company's money in his pocket.

Although I deplore the resort to violence in labor disputes, our history is replete with instances in which citizens engage in civil disobedience and resistance in labor disputes when they think that the authorities or the legal system has been bought off by their adversaries. Here all parties agree that the company was paying the deputy to furnish guard service

and assist in breaking the strike. It may have led the strikers to believe that they could not depend on local law enforcement to protect them during the strike. It may have influenced them to resort to violence. Both sides were in the wrong. In such a situation, we should be careful to apply the law in a neutral and objective way. Since I can find no basis for a continuing search after the carbine was found, I would suppress the weapon in question.

APPENDIX II.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
Northern Division

No. CR. 3-79-37

[Filed: Oct. 3, 1979]

UNITED STATES OF AMERICA

v.

DANNY LEE FULTZ

MEMORANDUM

Defendant is charged with possession of a firearm which was not registered to him in the National Firearm and Transfer Record as required by Chapter 53, Title 26, United States Code, 26 U.S.C. § 5861(d). The firearm, a sawed-off shotgun, was found in the defendant's truck during a warrantless search by officers at night.

Defendant has filed a written motion to suppress the evidence obtained by reason of the search. The parties have agreed that the outcome of this motion will determine the final disposition of the case.

Two issues are presented by the motion: First, did the defendant voluntarily consent to the search? And secondly, was there, in any event, probable cause for the warrantless search?

There is conflicting testimony on the first issue. Defendant, with his witnesses, testified that coercion was used on the part of the officers, and argues that by reason of this coercion his consent cannot be said to have been voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

The defendant says that as one of the officers came on the scene, he announced, "If you don't agree to the search, I will stay here all night and pry the doors of the cars open in order to find what is in them." The Defendant has offered further evidence to the effect that the officers used ugly language in threatening the accused if he refused to allow the officers to make the search. There was also testimony that the officers had their weapons drawn when they made this announcement.

The officers deny that such language was used by any of them, and also that their weapons were drawn. The Government has offered competent testimony that the defendant expressly consented to a search of his vehicle in response to requests free from coercion.

When a defense of this kind is raised by one who has been searched, the burden is placed on the Government to show that the consent was voluntary. *Schneckloth v. Bustamonte, supra.*

There is a question in the mind of the Court, based on the evidence in this case, as to whether or not the defendant unqualifiedly consented to the search. The law is strict on the question of whether a person who is searched, without a warrant, *voluntarily* consented to the search. *Schneckloth v. Bustamonte, supra*; *Bumper v. North Carolina,* 391 U.S. 543 (1968); *U.S. v. Mayes,* 552 F.2d 729 (1977). In order for the consent to be valid, it must be made without coercion or restraint of any kind. *Schneckloth, supra*; *Bumper, supra.*

If the Court believes the testimony of the officers, then the search must be found to have been a legal one, because the defendant consented to it. If, on the other hand, the Court believes the testimony of the defendant and his witnesses, then the consent was not voluntary and the motion to suppress must be granted and the case dismissed.

The Court finds that the Government has failed to sustain its burden of showing that defendant voluntarily consented to the search. Accordingly, the warrantless search cannot be justified on the ground that defendant consented to it.

That brings us to the second issue: that is, whether there was probable cause to search the vehicle. The Court recognizes that probable cause by itself is not sufficient to justify a warrantless search. Rather, there must be exigent circumstances which excuse the normal requirement that the determination of the existence of probable cause be made by "a neutral and detached magistrate." *Johnson v. United States,* 333 U.S. 10, 14 (1948); *Warden v. Hayden,* 387 U.S. 294 (1948). Ordinarily, it is improper for the one making the search to act as an officer and as a judge at the same time. *Johnson v. United States, supra*; *Mancusi v. De Forte,* 392 U.S. 364 (1968).

One such exigent circumstance that has been repeatedly recognized is the search of an automobile. *Carroll v. United States,* 267 U.S. 132 (1924); *Chambers v. Maroney,* 399 U.S. 42 (1970). The explanation of the officers for their failure to obtain a search warrant was that the nearest officer in Claiborne County authorized to issue warrants lived approximately 10 to 13 miles from the spot where the search was made. It was late at night and shots had evidently been fired from an

undetermined source. Finally, under the circumstances it was reasonable to believe that the congregation of union members was potentially volatile. We hold that the exigencies of the situation justified a warrantless search if there was probable cause.

Probable cause for a warrantless search of an automobile has traditionally been defined as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure. . . ." *Carroll v. United States, supra,* at 149. Undoubtedly, there had been a crime committed on the occasion immediately prior to the search. The officers had observed what they reasonably believed to have been gun shots in the area where the defendant was. The officers testified that the shots had come from the direction of a spot where a bus was parked along with four or five other vehicles, including that belonging to the defendant.[1] Finally, it was late at night and dark.

The Court's conclusion, based on the evidence presented at the hearing, is that under the circumstances known to the searching officers, it was reasonable for them to believe that defendant's automobile contained a firearm. There was therefore probable cause for the search. Accordingly, the motion to suppress must be denied.

As previously mentioned, defendant and his counsel have agreed that resolution of this motion will be dispositive of the merits of this case. Therefore, the Court must find the defendant guilty as charged.

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[1] It should be noted that defendant himself is not a member of the union, but was there with his wife who is. He testified that there was reason to fear for the strikers' safety.

Order Accordingly.

/s/ Bowen Taylor
United States District Judge

Supreme Court, U. S.
FILED
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No. 79-1912

In the Supreme Court of the United States

OCTOBER TERM, 1979

DANNY LEE FULTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his pickup truck violated the Fourth Amendment.

1. Following a jury-waived trial[1] in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of possession of a sawed-off shotgun, in violation of 26 U.S.C. 5861(d) and 5871. He was sentenced to one year in prison. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-6a).

The evidence adduced at the suppression hearing showed that shortly after midnight on June 28, 1979, weapons were fired toward a manufacturing plant in

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[1] The parties agreed that the outcome of the trial would be determined by the outcome of a suppression hearing held on September 28, 1979 (Pet. App. 7a).

Claiborne County, Tennessee, from a nearby area where a group of fifteen strikers and union supporters, including petitioner, were congregated (Pet. 3-4; Pet. App. 1a-2a). Plant security guard Robert Worsham heard two gunshots and saw "muzzle flashes" originating "right in the middle of the strikers" (Tr. 10-11).[2] He then heard six to eight more gunshots (Tr. 11). Deputy Sheriff Clyde Watson, who was sitting in a vehicle parked near the plant when the shots were fired, testified that the bullets passed several feet over him and struck the plant just above the entrance (Tr. 19-23).

Shortly thereafter, Chief Deputy Sheriff Norman Jesse, Investigator Arthur Ramsey, and several of the officers of the Claiborne County Sheriff's Office arrived at the scene (Tr. 24, 38). Jesse and Ramsey were shown the bullet holes in the plant and were advised that the firing had come from the strikers' location (Tr. 25, 34, 42, 73-74). Thereupon, Jesse, Ramsey and three other officers approached the strikers to investigate the shooting (Tr. 42). After the strikers stated that they had no information about the shooting (Tr. 42-43, 75), the officers commenced a search of the area, including six vehicles (Tr. 41-43). A carbine rifle that had recently been fired was found under a bus (Tr. 43-44). Another rifle was then found inside the bus, and two more rifles were recovered from an automobile (Tr. 44). Thereafter, a sawed-off shotgun was discovered hidden under a mattress in the camper unit on petitioner's pickup truck (Tr. 64-65, 78-79).

The district court denied petitioner's motion to suppress the shotgun (Pet. App. 7a-11a). It held that the officers had probable cause to believe that petitoner's truck contained a firearm because of the gunfire and that a search warrant was not required because of the exigent

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[2] "Tr." refers to the transcript of the suppression hearing.

circumstances involved—it was late at night, the nearest magistrate lived thirteen miles away, the situation was "potentially volatile" and the object of the search was a vehicle (Pet. App. 9a-10a).[3] The court of appeals agreed that the warrantless search was reasonable under the circumstances (Pet. App. 1a-3a). Judge Merritt dissented on the ground that there was "no evidence that the strikers fired more than one weapon" and therefore "no basis for a continuing search after the carbine was found" (Pet. App. 4a-6a).[4]

2. Petitioner's contention (Pet. 10) that there was no evidence supporting the reasonableness of the warrantless search of his vehicle is belied by the record. Moreover, this fact-bound question was resolved against petitioner in the two courts below, and further review by this Court is not warranted. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[5]

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[3]On the basis of the conflicting testimony of Deputy Sheriff Jesse and of petitioner and other defense witnesses, the district court ruled that the government had not established that petitioner had voluntarily consented to the search (Pet. App. 9a).

[4]The majority opinion, however, expressly ruled that "[i]t was reasonable for the officers to continue to search for other weapons after the carbine was found" (Pet. App. 2a). As the court explained (*ibid.*):

> * * * the witness to the shooting told the officers "they" had been firing shots and that he had seen several muzzle flashes. * * * Discovery of the carbine gave additional reason to seek other weapons since the officers then had reason to believe that the [strikers'] earlier disclaimer [of information about the gunfire] was false.

[5]Petitioner's contention (Pet. 8-9) that the decision below conflicts with the principle stated in *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979), that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable

Petitioner contends (Pet. 14-15) that a "higher standard of reasonableness" is required in this case to test the validity of the search because it involves a labor demonstration protected under the First Amendment. This contention is without merit. Contrary to petitioner's suggestion (Pet. 7, 11-12), the government conduct at issue here did not remotely implicate any First Amendment rights of the strikers. The search was directed at investigating violent criminal conduct, in a case where the risk of additional violence was present, not at regulating any legitimate union activity.

Petitioner's contention (Pet. 12-14) that a higher standard of reasonableness is required because Deputy Sheriff Jesse was also a part-time security employee of the struck company is similarly without merit. Even assuming that Jesse's conduct was influenced by his connection with the company, which was not shown by the record, the validity of a search is tested by the objective facts known by the officer at the time of the search, not by the officer's subjective intentions or motivations. See *Scott* v. *United States*, 436 U.S. 128, 135-138 (1978). Here, as the courts below found, the objective facts justified the search. Moreover, Jesse was only one of several officers who participated in the search, and it was another officer who discovered the shotgun in petitioner's truck (Tr. 64-65, 79).

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cause to search that person" is without merit. The record here amply establishes the existence of probable cause to believe that weapons were concealed in some of the strikers' vehicles. In *Ybarra*, by contrast, the police had no reason to suspect any of the persons in the bar other than the bartender. Accordingly, the vehicle searches here were valid whether or not there was probable cause to believe that any particular striker was responsible for the shooting. See also *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 556 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1980

DOJ-1980-08